



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2005

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2005-05828

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 227289.

The Texas Department of Insurance (the "department") received a request for specified private passenger auto rate filings of Home State County Mutual Insurance Company ("Home State"), Mercury County Mutual Insurance ("Mercury"), Old American County Mutual Fire Insurance Company ("Old American"), Paragon Insurance Group ("Paragon"), and Unitrin County Mutual Insurance Company ("Unitrin"). You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. Although you take no position regarding the remaining submitted information, you contend that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified Home State, Mercury, Old American, Paragon, and Unitrin of the department's receipt of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Home State, Mercury, Old American, and Unitrin. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note that some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2005-05349 (2005) and 2005-03512 (2005). With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in those prior rulings, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, you must continue to rely on Open Records Letter Nos. 2005-05349 and 2005-03512 as previous determinations. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the submitted information was not the subject of either prior ruling, we will address the submitted arguments.

Next, we note that the department acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301. A governmental body's failure to comply with the procedural requirements of this section results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.137 and the proprietary interests of third parties can provide compelling reasons for overcoming the presumption of openness, we will consider whether any of the submitted information must be withheld under section 552.137 or to protect the interests of the third parties.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Paragon has not submitted any arguments to this office explaining how release of the submitted information

would affect its proprietary interests. Therefore, Paragon has provided us with no basis to conclude that it has a protected proprietary interest in the submitted information. *See, e.g.*, Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the department may not withhold any of the submitted information based on any proprietary interest Paragon may have in the information.

Home State, Mercury, Old American, and Unitrin each assert that its respective information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if

¹The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Having considered the arguments of Home State, Mercury, Old American, and Unitrin and reviewed the information at issue, we find that the underwriting guidelines, manuals, and rules of Home State, Mercury, and Old American and the market determination matrix of Unitrin constitute trade secrets for purposes of section 552.110(a). We thus determine that Home State, Mercury, Old American, and Unitrin have made *prima facie* cases under section 552.110(a) for that information, and we have received no arguments to rebut their claims. Accordingly, the department must withhold the underwriting guidelines, manuals, and rules of Home State, Mercury, and Old American and the market determination matrix of Unitrin in the submitted information pursuant to section 552.110(a) of the Government Code.²

To conclude, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Record Letter Nos. 2005-05349 and 2005-03512, the department must continue to rely on those rulings as previous determinations. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The department must also withhold the underwriting guidelines, manuals, and rules of Home State, Mercury, and Old American and the market determination matrix of Unitrin pursuant to section 552.110(a) of the Government Code. The remaining information must be released to the requestor.

Although Home State, Mercury, and Old American each request a previous determination regarding the rate filings at issue, we decline to issue one at this time. Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

²As our ruling is dispositive, we need not address these third parties' arguments under section 552.110(b).

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

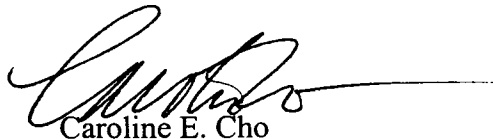
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 227289

Enc. Submitted documents

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